not been reported.[34] Asked about the Telcordia Texas activity during the Missouri hearing, Mr. Dysart could not even say whether it is going to examine any of the underlying data itself, as opposed to the data collection systems.[35]

3. Condition I expires too quickly

Condition I also will be in effect for much too brief a time to make a meaningful contribution, particularly when the OSS provisions of the Proposed Conditions are concerned. If one theory (certainly not the reality) of Condition I is to provide some protection in the local marketplace against the serious potential anticompetitive effects of this merger, the commitment to maintain a satisfactory performance plan should be equal in duration to the merger itself (*i.e.*, permanent).

Beyond that general concern, Condition I includes an excessive 9-month "break-in" period during which damages and penalties will not apply at all.[36] Condition I then provides for those damages and penalty terms to apply for three years thereafter. This term is not considered against Applicants' commitment to roll out new uniform OSS interfaces in 24 months. If Applicants meets that target, Condition I will apply to the new OSS systems for a maximum of 21 months. In the very likely event of slippage in the uniform interfaces schedule, Condition I's application in the new environment will be even more brief. Introduction of new OSS systems,

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[34] AT&T and other competitive LECs have expressed concern about the lack of information regarding Telcordia's activity and have requested the opportunity to participate in and comment on the validation activity. *See* AT&T Texas Validation Concerns Letter. That request has been denied, pending the issuance of a report by Telcordia, which is not to occur before July 22, 1999.

[35] Missouri 271 Proceedings, Tr. 2188-89.

[36] SWBT has negotiated a three-month break-in period in interconnection agreements throughout its territory. *See, e.g.*, AT&T-SWBT Texas Interconnection Agreement, Attachment 17, section 8.1 (April 1998).

during the infancy of local competition, will be a competitively-sensitive exercise to say the least, with enormous potential for performance breakdown by Applicants. In addition to all its other deficiencies, Condition I fails to offer assurance that performance will be monitored, and performance standards enforced, through the time that the new OSS systems, if they are implemented at all, reach commercial stability and reliability across the 13-state area.

* * *

The proposed Federal Performance Parity Plan set out in the Proposed Conditions offers nothing that Applicants not already obligated to provide under the Act. It offers less than what SBC has agreed to provide in Texas. It offers less than Applicants appear willing to provide in other states, unless they receive a signal from this Commission that less will suffice. Because it confers no net benefit in terms of performance measurements or self-enforcement, Condition I makes no contribution to addressing the anticompetitive effects threatened by the merger. Condition I does, however, threaten to lower the standards under which individual states and negotiating parties will establish performance measurement and enforcement terms.

Collocation Compliance Plan (Condition II)

Proposed Condition II is fundamentally flawed. First, it seeks merely to require Applicants to obey their pre-existing duty to implement the Commission's rules on collocation, a duty contained in the Act. Second, even if Condition II in fact sought to "*create* pro-competitive benefits that at least in part mitigate the potentially negative impacts of the proposed merger,"[37]

[37] *Memorandum Opinion and Order, Applications of NYNEX Corp. Transferor, and Bell Atlantic Corp. Transferee, For Consent to Transfer Control of NYNEX Corp. and its Subsidiaries*, 12 FCC Rcd. 19985, ¶ 14 (FCC Aug. 14, 1997) ("*BA-NYNEX Merger Order*") (emphasis added).

the mechanisms that Applicants chose to implement such goals – primarily a post-merger audit by a firm chosen, retained, and paid by Applicants – are seemingly designed to provide Applicants with the broadest latitude in executing (or ignoring) proposed conditions. Applicants are required to do almost nothing before their merger closes, and even the post-merger audit requirement grants Applicants and their auditor unreviewable discretion to define the audit's presently uncertain scope, shrouds many key decisions in confidentiality, and ultimately leads only to a brief attestation report with no sanction for any noncompliance with the collocation rules. This apparent surrender of authority to Applicants and their auditor is likely to have a significant anticompetitive effect, given Applicants' poor record in providing timely access to collocation on just, reasonable, and nondiscriminatory terms, as well as the cramped and unlawful interpretations of the Commission's new collocation rules[38] that they have already unveiled to competitive LECs and before state commissions.

A. There Can Be No Public Benefit From Merely Requiring Applicants To Follow the Commission's Existing Rules

Most fundamentally, Condition II could *never* serve the public interest because its primary aim – that Applicants "shall provide collocation consistent with governing Commission rules" (Proposed Conditions ¶ 3) – would provide a benefit to which the public is already entitled entirely apart from the merger. Even if the Compliance Plan were effectively designed to achieve this goal – which it is plainly not, *see infra* – it could not possibly lead to the type of pro-competitive benefits that merger conditions are intended to create.

[38] *See* First Report and Order And Further Notice of Proposed Rulemaking, *In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket 98-147, 1999 WL 176601 (FCC March 31, 1999) ("*Collocation-Advanced Services Order*").

In particular, Condition II is designed to ensure that Applicants obey and implement the Commission's recently adopted collocation rules in the *Collocation-Advanced Services Order*. But that Order was released on March 31, 1999, and became effective and binding law on June 1, 1999. As of that date, all incumbent LECs, including Applicants, became obliged to obey those collocation rules. Implementing those rules is Applicants' pre-existing duty under the Act, not a price to be paid to gain merger approval. For Applicants to assert that a "Compliance Plan" to determine whether they have obeyed existing rules would provide "immediate and substantial benefits to the public"[39] only suggests that Applicants have become cavalier toward the Commission's rules – a reason to deny the merger outright, not to approve it.

B. The Compliance Plan Affords Applicants Or Their Auditor Unfettered Discretion At Nearly Every Step

Even if the Compliance Plan were properly conceived to create added benefits to reduce the anticompetitive nature of the merger, its process for obtaining those benefits is poorly designed to achieve any pro-competitive goal. Each step in Condition II leaves far too much discretion in the hands of Applicants or their auditor, and contemplates far too little participation from the Commission staff and the public.

1. Condition II's Requirements Prior to the Merger Close are Meaningless

As an initial matter, the *only* steps that Applicants must take prior to close of the merger are to select an auditor and to file tariffs or amendments to interconnection agreements that reflect their interpretations of the Commission's new collocation rules. Proposed Conditions

[39] Letter from Richard Hetke (Ameritech) and Paul Mancini (SBC) to Magalie Roman Salas, CC Docket No. 98-141, at 1 (FCC July 1, 1999) ("July 1, 1999 Letter").

¶¶ 4-6. The Compliance Plan's audit occurs entirely after the merger closes (*id.* ¶ 6(a)-(g)), and so long as tariffs or amendments have been filed, the Compliance Plan permits Applicants to merge. Condition II thereby encourages Applicants unilaterally to set rates and conditions for these collocation issues on the most restrictive terms conceivable.[40] By granting merger approval before an assessment of Applicants' compliance has even begun, Condition II accomplishes nothing prior to the close of the merger and assures that even the purported "benefit" of compliance with existing law will not come, if it comes at all, until well after the merger closes. That is an objectionable result in all events, but it is even more harmful because the post-merger audit provides no assurance that any anticompetitive tariffs and amendments that Applicants have filed before the merger will be detected or properly remedied.

2. Condition II Grants Applicants and their Auditor Almost Complete Authority to Determine the Scope of the Post-Merger Audit

The post-merger audit at the heart of this merger condition, despite Applicants' claims that it resulted from "long and detailed negotiations,"[41] is amazingly undefined in scope. The few requirements that are disclosed in Condition II indicate that it is ill-suited to achieve even its limited goal of assessing Applicants' compliance with the Commission's collocation rules. Notably, Condition II would not require Applicants to submit even "preliminary audit requirements" that include the audit's "proposed scope" until more than two months *after* the merger closes. Proposed Conditions ¶ 6(a). But even at that point, the public will not be told

[40] Indeed, to the extent that revised tariffs already have been filed at the state level, it is apparent that Applicants have adopted cramped readings of the Commission's new collocation rules and have interpreted those rules in radically different ways than the competitive LECs.

[41] Ex Parte Presentation to Magalie Roman Salas (FCC) to Richard Hetke (Ameritech) and Paul Mancini (SBC), CC Docket 98-141, at 1 (FCC July 8, 1999).

what the precise scope of the audit is, because Condition II proposes that the "preliminary audit requirements shall be afforded confidential treatment." *Id.*

Even the Commission's Audit Staff, though they will be informed of the audit's proposed scope (unlike any other Staff members), cannot require Applicants or their auditor to enlarge the audit's scope, no matter how limited the proposal. *Id.* ¶ 6(a) ("[Applicants] shall consult with the Audit Staff regarding changes to the preliminary audit requirements, but Commission approval . . . *shall not be required.*") (emphasis added). Through this term of Condition II, the Commission would wholly surrender to the very company it is regulating the Condition's principal enforcement mechanism – without retaining any final review – on a critical provision of the Act it administers. Such a plan could not possibly serve the public interest.

3. The Auditors are Required Only to Have Limited Contacts with Commission Staff and None Whatsoever with Competitive LECs

Once the audit begins, Commission Staff can provide only limited input to the Applicants' auditors, affording them with even more discretion in conducting the audit. Although Commission Staff is "inform[ed]" of revisions to the Audit and "notif[ied]" of meetings between Applicants and their auditor (though only insofar as the meetings discuss "audit findings"), Condition II affords Commission Staff no ability to object to those changes or to participate more directly in meetings or in other aspects of the audit. Proposed Conditions ¶ 6b. Likewise, Condition II does not require the auditor to make *any* contact with competitive LECs or with state commissions, both of which will have information vital to any valid assessment of Applicants' compliance with the Commission's collocation rules. An audit of this type that leaves such contacts to the discretion of the auditor cannot be considered authoritative. Likewise, Condition II provides no opportunity for the public to contest or respond to findings, a defect that only further insulates the conduct of Applicants and their auditor from review.[42]

4. Condition II Is Silent on Remedies for Noncompliance

If the audit results in any findings that Applicants have violated the Commission's collocation rules, Condition II contains no provision whatsoever for enforcement, either by the auditor or by the Commission. And although the Chairman has touted the "stiff penalties" to which Applicants have agreed for violating other proposed conditions,[43] nothing in Condition II requires Applicants or their auditor to lift a finger in response to the audit, no matter how severe the violations may be. Even assuming that prodding by regulators or the hope of interLATA relief pursuant to Section 271 motivates Applicants to revise their policies according to the audit's findings, they will have lost nothing by their failure to comply, while competitive LECs' entry into local markets will have been further impeded, for many months beyond the close of the merger, because of Applicants' violations of *existing* Commission Rules.

The unfettered discretion that Applicants and its auditor are granted under Condition II is likely to result in these anticompetitive harms because Applicants have already revealed before some state commissions their interpretations of the Commission's new collocation rules, and it is evident that Applicants interpret those rules in the most limited way possible, despite the clear

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[42] Indeed, even though the one-page attestation report will be available to the public – apparently the only public document to be released under this Condition -- the public's ability to review or contest the auditor's finding will be hampered because public access to the auditor's "workpapers and supporting materials" is limited. Keeping these materials hidden from view is inconsistent with the Act, particularly because Applicants' ability to provide collocation will be at issue in any applications they make pursuant to Section 271 and in state proceedings relating to the validity of their revised collocation tariffs and amendments to interconnection agreements.

[43] Statement of FCC Chairman William E. Kennard Regarding SBC/Ameritech Proposal on Market Opening Conditions to Address April 1st Letter on Merger, CC Docket 98-141 (FCC June 29, 1999)

terms of the *Collocation-Advanced Services Order.* Numerous disagreements between competitive LECs and Applicants over the scope of the *Order* have already developed, including such issues as alternative collocation arrangements, security for collocated space, and the pricing of collocation. For example, despite the Commission's holding that incumbent LECs must provide access to what the *Collocation-Advanced Services Order* (¶ 41) termed "shared collocation cages," both Applicants have stated their view that they will not perform that duty and that one competitive LEC must order caged physical collocation, pay for the all of the space, and then arrange with other competitive LECs to divide the space. Likewise, even though the Commission required incumbent LECs to make available "cageless collocation" (*id.* ¶ 42), SBC has nonetheless asserted that the *Order* still permits it to construct separate hallways and separate partitioned areas for competitive LECs.[44] As just these few examples show, there are likely to be substantial disagreements about the scope of the Commission's new Rules, which makes it imperative that the Commission retain its oversight and enforcement functions.

This Condition, therefore, is in fact no condition at all, but rather a license for Applicants to continue to flout the Commission's collocation rules and to deny competitive LECs timely access to collocated space on just and nondiscriminatory terms. Under Condition II, Applicants need do nothing prior to the merger other than file tariffs based entirely on their own views of the meaning of the Commission's new Rules, entirely secure that no inquiry into the legality of those views will be made until months after their merger closes. Even then, the assessment will be

[44] *See* Opposition of Ameritech to Sprint's Petition For Partial Reconsideration And/Or Clarification, CC Docket No. 98-147 (FCC July 12, 1999); Opposition of SBC Communications Inc To Sprint Corporation's Petition For Partial Reconsideration And/Or Clarification, CC Docket 98-147 (FCC July 12, 1999).

conducted by a firm of Applicants' own choosing, operating under a cloud of secrecy, performing an audit with a scope determined by Applicants, with limited input even from the Commission, let alone the public, and resulting in a declaratory ruling with no express penalty even for the grossest of violations.

OSS: Enhancements and Additional Interfaces (Condition III)

While the requirement that Applicants make improvements to its OSS interfaces is to be commended, Applicants' proposed condition relating to OSS interfaces falls far short of what is necessary to mitigate the anticompetitive effects of the proposed merger. Condition III is long on vague promises about what Applicants will offer to competitive LECs in the future, but woefully short of substance about what those future proposals will actually contain. In substance, all that Applicants have offered are paper promises to negotiate with competitive LECs about uniform interfaces and business rules, change management processes, access to SBC's service order retrieval and distribution system ("SORD"), and electronic bonding interfaces ("EBI"). But as the Commission has found "a BOC's promises of *future* performance to address particular concerns . . . . have no probative value."[45]

A. Uniform Interfaces

Tellingly, Applicants provide no information in Condition III about how they plan to move toward uniform application-to-application and graphical user interfaces with uniform business rules throughout the combined region. While AT&T agrees that quality implementation of uniform interfaces that include uniform business rules will ultimately benefit competition,

[45] *Ameritech Michigan Order* ¶ 55 (emphasis in original) (citations omitted).

Applicants should be required to make meaningful commitments now about how it plans to achieve that objective. Instead, without revealing the substantive terms that they plan to support, Applicants offer only future promises to negotiate with competitive LECs on these issues. Indeed, consolidation of multiple, disparate interfaces under a schedule controlled by Applicants and pursuant to an inadequate change control process could have the perverse effect of substantially harming competitors' efforts to enter the local markets.

In addition to the lack of any substantive promise or commitment, the schedule presented in Condition III for the deployment of such uniform interfaces is deficient because it is improperly divided into two separate processes, is far too long, and is subject to far too many procedural restrictions to mitigate the anticompetitive effects of the proposed merger. Condition III allows 24 months (and potentially far longer) for Applicants to develop and deploy uniform application-to-application and graphical user interfaces and 30 months (or longer) for the development and deployment of the uniform business rules essential to those interfaces. *See* Proposed Conditions ¶¶ 9, 10, 14.[46] This proposed procedure makes no sense because there can be no uniform interfaces without uniform business rules.

Business rules are an integral part of an OSS interface. This is clear from the standards and guidelines for OSS interfaces developed by the Alliance for Telecommunications Industry Solutions ("ATIS"). The output of ATIS is not limited to rules for translating information into a particular computer language and format such as Electronic Data Exchange ("EDI"), but also extends to the development of the necessary business rules. For example, the Ordering and

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[46] Without explanation, even longer periods are provided for the deployment of uniform interfaces in Connecticut.

Billing Forum ("OBF") of ATIS develops and publishes local service ordering guidelines ("LSOG") which define the transactions that can be conducted by the parties, the forms that should be used, and the precise information that must be exchanged, including the data elements or fields that are required for each transaction, the size of each field, how information must be formatted within each field, and what values are "valid" and acceptable for each field. These "guidelines" are what are referred to as business rules, and those business rules are an essential component of the "standards and guidelines as defined, adopted, and periodically updated by" ATIS for OSS interfaces to which Condition III relates.

Accordingly, the use of a particular standard computer language, such as EDI, is only a starting point for the development of functionally effective and efficient OSS interfaces.[47] Until the business rules are also fully understood and agreed upon by the parties, no transactions can take place over the interface. It is the business rules that give shape to and define the interface. To the extent the business rules differ, the interfaces necessarily differ.

Because uniformity of business rules is an inherent and fundamental part of the development and deployment of uniform interfaces, it cannot, and should not, be separated out on a separate track for implementation at a later date. Differences in business rules can create a substantial barrier to competitive LEC entry by imposing large costs on competitive LECs seeking to provide local telecommunications services across multiple regions. Without uniform

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[47] Indeed, Applicants apparently believe that they have not even committed to implement the use of a particular version of EDI. An Ameritech witness in the Illinois state proceeding to consider this merger recently testified that a "uniform" interface does not necessarily mean the same interface, and that he did not believe that Applicants needed to roll out the same version of EDI or implement the same business rules throughout the merged territory to be uniform. Illinois ICC Docket No. 98-0555, Tr. 7/14/99 p. 2309.

business rules, competitive LECs will continue to have to design and program their systems, and train their personnel, to deal with regional differences in obtaining access to Applicants' OSS systems, and the benefits of uniform interfaces will be lost. This conclusion is reinforced by the Commission's prior order approving the merger of Bell Atlantic and NYNEX, where the Commission stated that the purpose of the uniform interfaces condition was to facilitate entry by enabling new entrants to develop and test an interface in one state and then use that same interface, without further development or testing, in other states – a benefit that will not be achieved if different business rules are permitted to exist in the different states.[48]

Condition III is also deficient to the extent that it permits the deployment of a "software solution" as an alternative to the deployment of uniform business rules. It is not clear from the description (¶ 14) what this "software solution" is, why it is listed as an alternative to the development of uniform business rules, or whether the competitive LEC or Applicants would be responsible for installing the software.[49]

The schedule provided in Condition III for the deployment of uniform interfaces is also too long[50] and subject to the likelihood of substantial delays which could preclude that goal from

[48] *BA-NYNEX Merger Order* ¶¶ 13-14, 195 (stating that the purpose of the uniform interfaces condition was to facilitate competitive LEC entry by making it possible for competitive LECs "to use the same interfaces and OSS systems from Maine to Virginia" without "hav[ing] to test different interfaces for each state").

[49] The only way that a software solution would be acceptable is if the result is transparent to competitive LECs. In other words, the competitive LEC should see uniform business rules regardless of how that result is achieved by Applicants.

[50] In sharp contrast to the 24 months (or more) allowed here for the deployment of interfaces in accordance with industry standards and guidelines and the 30 months (or more) allowed for the deployment of interfaces with uniform business rules, the *BA-NYNEX Merger Order* required the implementation of industry standards and guidelines for interfaces within 180 *days* and the implementation of fully uniform interfaces throughout the combined region within 15 months of the Commission's Order. *See id.*, App. C, Conditions 2(a) and 2(c).

ever being achieved. Indeed, the implementation times allowed here are subject to indefinite extension which could easily extend beyond the date on which those Conditions would cease to be effective under the Merger Condition's three-year sunset provision. *See* Proposed Conditions ¶ 68. The 24 and 30-month time periods provided in the Proposed Conditions are applicable only if all of the competitive LECs participating in the proposed collaborative workshop fully acquiesce within one month in all aspects of whatever implementation plans are proposed by Applicants. If all competitive LECs do not acquiesce in all aspects of the proposed plan, the plan is subject to arbitration which is unlimited in duration and virtually certain to delay substantially the deployment of uniform interfaces.

This schedule is grossly unfair to competitive LECs. In Phase 1, Applicants are given five months to develop a proposal for developing and deploying uniform application-to-application and graphical user interfaces for all OSS functions (and an additional six or more months to develop a proposal for uniform business rules). As an initial matter, it is unclear why Applicants need 5 months to develop such a proposal – they should be able to have that proposal ready by the Merger Closing Date or very shortly thereafter. Moreover, competitive LECs are then allowed only 1 month in Phase 2 to review all the details of Applicants' proposals and either agree or face prolonged delays in the deployment of uniform interfaces. One month is far too short for meaningful competitive LEC analysis of Applicants' proposed plan.[51] The consequence of not accepting Applicants' proposed plan in full within 1 month, on the other hand, is an unlimited delay in the deployment of uniform interfaces through an arbitration

[51] For example, in the Ameritech region, the competitive LECs were engaged in negotiations pertaining to the implementation of EDI 7.0 for more than a year, and have been discussing the implementation of EDI 10 since November of 1998.

process which is unbounded in duration and stacked with provisions highly disadvantageous to competitive LECs.

Specifically, there is no time fixed in Condition III for either the commencement or the conclusion of arbitration. No time is fixed for the Chief of the Common Carrier Bureau to decide that arbitration is appropriate and should begin, and no time is fixed for the arbitrator to render a decision. As a result, the proposed arbitration could easily extend for many months or even years – well past the 3-year sunset date on which the conditions cease to be effective and binding on Applicants.

Furthermore, Condition III expressly *prohibits* Applicants from doing any work on the development or deployment of uniform interfaces until they have received the arbitrator's decision on all matters in dispute.[52] There is no apparent reason why Applicants are not required to begin work on all aspects of the development and deployment of uniform interfaces other than those matters which are in dispute and subject to arbitration as soon as the time has passed for competitive LEC objections to the proposal so that the deployment of uniform interfaces is not unduly delayed.

In addition to the obviously inadequate time periods provided in the Proposed Conditions, the proposed conditions contain several manifestly inequitable procedural provisions relating to potential arbitrations.[53] For example, Applicants are the sole source of information about unresolved issues that is submitted to the Chief of the Common Carrier Bureau for

[52] *See* Proposed Conditions ¶ 11(b) ("No work shall begin in Phase 3 until . . . SBC/Ameritech receives the arbitrator's decision"). *See also id.* ¶¶ 14.b, 16.c(2) (same).

[53] *See id.* ¶¶ 11(b), 11(c), 14(c). *See also id.* ¶ 15 (change management), ¶ 16(c)(3) (digital subscriber line and other advanced services).

determination as to whether arbitration should take place; competitive LECs are not permitted to present their objections and counterproposals. Similarly, the authority of the Chief of the Common Carrier Bureau is limited to approval of Applicants' plan as the only alternative to arbitration; the submission, much less approval, of any competitive LEC counterproposals is not authorized.

The arbitration process itself is already further and demonstrably biased in favor of Applicants, because it requires that the arbitrator or the subject matter experts it consults (depending upon how the applicable provisions are construed) be chosen from a list compiled exclusively by Applicants.[54] AT&T is not aware of any "arbitration" process whereby one party is granted the right to designate the decision-maker or the experts it consults. There is simply no conceivable public interest purpose served by such a provision.

The express determination in Condition III (¶¶ 11(b), 14(b), 15, 16(c)(2)) that Telcordia Technologies (formerly Bellcore) would always be an acceptable subject matter expert with whom the arbitrator could consult is suspect in view of the close historical and business relationship between Telcordia, SBC, and Ameritech, and the lack of impartiality demonstrated by Telcordia in connection with Telcordia's role as the third-party test consultant in Texas. For example, Telcordia's test plan in Texas includes a provision stating that certain OSS test data as proprietary to SBC; thus, it is unclear whether the test data will be made available to competitive

[54] The relevant provision states that "[a]ny such consolidated binding arbitration shall be conducted before an independent third party arbitrator in consultations with subject matter experts selected from a list of three firms supplied by SBC/Ameritech." Proposed Conditions ¶ 16(c)(3). Although not free from ambiguity, it appears that the draftspersons of this language intended that the subject matter experts, not the arbitrators, be designated by Applicants. If so, this still substantially biases the process, given the important role to be played by the subject matter experts in the resolution of complex disputes.

LECs. Further, after testing had begun, it became clear that Telcordia was reporting to SBC (but not to the competitive LEC test participants) on problems uncovered by Telcordia, and that SBC and Telcordia had discussed potential solutions to those problems without any input from the competitive LEC test participants. And, after AT&T complained that certain test status reports and other documentation described in the master test plan were not being distributed as required, Telcordia simply revised its test plan (two months after test execution had begun) to change the documentation requirements.[55] In these circumstances, there is no factual basis for Applicants' unprecedented effort to have Telcordia pre-approved as a subject matter consultant, and their explicit singling out of Telcordia as an acceptable expert raises serious questions about its motives.

Additionally, there is no basis for the arbitrary caps proposed for the payments to be paid by Applicants in the event that they fail to meet the target dates set for the deployment of commercially ready uniform OSS interfaces. Indeed, the proposed caps are so low that they might induce Applicants not to comply and pay the fine so as to avoid the costs associated with compliance and the increased competition that would result from having uniform interfaces.

In addition to requiring Applicants to provide uniform interfaces within 24 months, Condition III also requires (¶ 9) Applicants to develop and deploy "commercially ready" uniform interfaces within 24 months. However, the conditions do not specify any penalty for a failure to meet this commercial readiness requirement. Nor do they provide any test for

[55] Concerns about the lack of communication in connection with the Texas test has also led the Texas PUC to require Telcordia to file an interim report on testing issues. Concerns about Telcordia's impartiality have also been raised in Missouri, where one commissioner questioned whether any testing involving Telcordia could be considered valid given its prior relationship with the Regional Bell Operating Companies.

determining whether Applicants have met this requirement. For example, the Proposed Conditions make no provision for third party testing of Applicants' proposed new uniform interfaces to verify that they can handle expected commercial volumes. Without specifying the requirements for commercial readiness, penalties for noncompliance, and independent validation of compliance, the Proposed Conditions establish only another vague promise of future conduct.

Similarly, Condition III states (¶ 8) that, no later than the Merger Closing Date, Applicants will provide to the Commission an OSS "Process Improvement Plan" assessing SBC's and Ameritech's existing OSS and "generally identifying the OSS changes that are needed to implement SBC/Ameritech's OSS commitments identified in this Section." This information is essential to any meaningful evaluation of the proposed OSS merger conditions. However, to be useful, the public must be provided with the Plan and permitted the opportunity to comment upon it *now* – before the merger conditions are approved – so that the Commission could accurately assess Applicants' commitments and provide express approval of them.

Finally, it is essential that any transition to uniform interfaces be supported by robust change control procedures, which, as discussed below is Section B, are woefully inadequate in the proposed conditions. Particularly in those states where customers are already being served, adequate means must be in place – which must include "versioning" capabilities that enable competitive LECs to transition smoothly to new interfaces – to ensure that competitive LECs are not hampered in their ability to continue to serve those customers by the transition to new interfaces. Otherwise, Applicants will be able to use the requirement of uniformity to change the interfaces in those states where there is the most competition.

B. Change Management Process

An effective change management process is essential to competitive LECs' ability to compete effectively in the local exchange market, and is particularly essential to the transition to uniform interfaces within Applicants' region.[56] Condition III falls far short of providing for an effective change management process. First, it gives no recognition to existing change management processes within the region. The Proposed Conditions would enable Applicants to abrogate effective change management processes that have already been negotiated and are currently in place in certain states within the region (such as the process currently in place in California) and to replace them with a watered-down change management process that gives less protection to competitive LECs.[57] Thus, competitive LECs should have at least the same rights and protections that they currently enjoy.

More fundamentally, however, Condition III is inadequate because it does not define the substantive provisions that should be included in an acceptable change control procedure. Indeed, it is so lacking in guidelines, criteria, timetables, details, and procedural fairness that no meaningful change management process can result. *See* Proposed Conditions ¶ 15. Condition III contains absolutely no information about the terms that Applicants will commit to agree to in

[56] The Commission has also recognized the importance of an effective change management process in its Section 271 Orders. *See* Memorandum Opinion and Order, *Application of BellSouth Corp. Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in South Carolina*, 13 FCC Rcd. 539, ¶ 164 (1997); *Ameritech Michigan Order* ¶ 137.

[57] This is precisely what SBC attempted to do when SBC recently met with competitive LECs to negotiate a change management process for its 7-state region, where SBC pressed for a change management process that offered considerably fewer rights to competitive LECs, and far more advantages to SBC, than the change management process that SBC had previously negotiated with AT&T for California.

the negotiations contemplated by the Condition. As just one example, Condition III lacks any detail regarding Applicants' continuing operation of and support of interfaces during an upgrade and for some period of time after an upgrade. Such provisions would ensure competitive LECs have the ability to adapt their own internal operations and to migrate seamlessly to a new interface without undue cost burdens, loss of existing capabilities, or customer impacts. If terms like these are not provided now, Applicants are likely to present competitive LECs on a take-it-or-leave-it basis with a meaningless change management process in which Applicants retain virtually unfettered discretion to make unilateral changes in their interfaces whenever they wish to make them, and competitive LECs have no meaningful alternative to accepting that proposal. Such a result would be particularly disastrous here because Applicants can be expected to make significant changes to its interfaces to achieve uniformity.

Likewise, Condition III is deficient because there are no meaningful time limits and sanctions that would ensure that Applicants do not simply delay the negotiations. As Condition III is presently drafted, Applicants are only required to enter into negotiations with interested competitive LECs within 12 months of the Merger Closing Date. *See* Proposed Conditions ¶ 15. There is no time set for Applicants to submit its proposal to competitive LECs or for the submission of disputes to the Chief of the Common Carrier Bureau. Furthermore, because there is no financial penalty established in this condition for noncompliance, it appears that the Commission's only remedy in the event of a failure to meet the 12-month deadline would be an extension of the period. *Id.* ¶ 64. In addition, pending the final resolution of all disputes through arbitration, Condition III appears to grant Applicants unfettered discretion to select which "components" of its proposed change management plan to implement on an interim basis.

Id. ¶ 15. Finally, the arbitration provisions contain virtually all of the procedural deficiencies and inequities discussed above with respect to the arbitration of uniform interfaces. *Id.*

C. Access To SORD

With respect to Applicants' proposal to offer competitive LECs direct access to SBC's service order system, SORD, Merger Condition III is far *less* generous than the commitments which SBC has previously made to competitive LECs. SBC previously committed to competitive LECs that it would make direct access to SORD available to all competitive LEC OSS subscribers in Southwestern Bell territory at no additional OSS access charge and without passing on SBC's development costs.[58] Competitive LECs were to be charged only for attending SORD classroom training.

Now Applicants propose (¶12) to charge competitive LECs for the costs of developing direct access to SORD as well as training costs. Moreover, Applicants' offer is now limited to a period of 30 months after the Merger Closing Date, and any competitive LEC requesting SORD access must negotiate and enter into a written contract with SBC. This proposed condition represents a step backward to an earlier position of SBC that SORD access would be made available to competitive LECs only on a bona fide request basis with unspecified development costs to be paid by the competitive LEC.[59]

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[58] *See* Texas Collaborative Process Workshop at 616-17 (Texas PUC Aug. 28, 1998) ("the development cost to make SORD generally available would be absorbed by Southwestern Bell") (L. Ham).

[59] Applicants' parallel offer to develop direct access to the "equivalent service order process system[s]" of Ameritech and SNET is too vague to adequately assess. Applicants have not specified those "equivalent systems."

D. Changes to EBI Interface

Applicants' offer to develop enhancements to its EBI interface[60] in advance of industry standards is likewise deficient on a number of levels. First, Applicants' attempt to foist their development costs for changes to its EBI interface in advance of standards is unacceptable. Applicants are obligated to provide competitive LECs with nondiscriminatory access to their OSS regardless of the status of industry standards,[61] and the nondiscrimination requirement includes an adequate application-to-application interface for repair and maintenance.[62] There is no reason why Applicants should not pay for their own development costs in achieving compliance with the requirements of the Act. Second, given that repair and maintenance has been used as an interface since long before the Act was passed, certain functionalities of the EBI interface for repair and maintenance have already been adopted by standards bodies. However, the Proposed Conditions do not identify the additional functionalities for which Applicants seek to recover their development costs.

OSS: Waiver of Charge (Condition IV)

Condition IV will do nothing to open Applicants' local monopolies to competition. As an initial matter, this Condition is hopelessly vague. While the Condition provides that Applicants may not charge "for use of [their] standard electronic interfaces for *accessing* OSS,"

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[60] The EBI interface is used for repair and maintenance orders.

[61] *See, e.g.*, First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15499, ¶¶ 517-28 (1996) ("*Local Competition Order*").

[62] *See, e.g., id.* ¶¶ 519, 523, 525.

elsewhere it states that this limitation "does *not* affect [Applicants'] right . . . to recover the costs of *developing and providing* OSS to CLECs through the pricing of UNEs or resold services." Proposed Conditions ¶ 18 (emphasis added). Nowhere does the Condition explain the difference between charges related to "accessing OSS" and charges for the "developing and providing of OSS." Indeed, there is nothing in the Condition that precludes Applicants from arguing that the costs of "developing and providing of OSS" include the costs of "access" to OSS. Thus, rather than eliminate OSS-related charges, Condition IV appears to only change how Applicants will send their bills.[63]

Indeed, Conditions III[64] and IV are fatally flawed because they do not even include any meaningful provisions on pricing or cost recovery. They do not even require that these OSS-related charges be based on forward-looking, economic costs.[65] Instead, Condition IV vaguely states that Applicants may increase network element rates to recover "the costs of developing and providing OSS." Given SBC's vigorous advocacy of embedded cost-based pricing for network elements, it will no doubt be the case that Applicants will seek to recover in their network element rates the historical costs of developing OSS, rather than the efficient, forward-looking costs of developing OSS. The predictable result, of course, will be that competitive

[63] To the extent this Condition is intended to eliminate per query OSS charges, but still allow SBC to recover the costs of developing electronic interfaces for its OSS, it is largely an empty gesture. The efficient, forward-looking costs of such OSS access are insignificant.

[64] Condition III also appears to permit Applicants to impose a number of OSS-related charges. *See* Proposed Conditions ¶¶ 12-13. There is no discussion in the Proposed Conditions between the relation of the charges discussed in Condition III and the "prohibitions" of Condition IV.

[65] Condition IV is also flawed because it appears (by implication) to permit Applicants 1) to impose OSS-related charges in the context of resold services even though Applicants' retail services already include the costs of OSS; and 2) to impose charges for non-electronic orders even if Applicants' OSS cannot support electronic orders.

LECs will need to spend significant resources and time challenging such competition-foreclosing rates before the state regulatory commissions.

Moreover, to the extent Condition IV would permit Applicants to charge new entrants for *all* of the costs – whether forward-looking or embedded – for developing OSS, it squarely violates the Act. Section 251(c)(3) of the Act requires incumbent LECs to provide access to their network elements on "rates, terms, and conditions that are just, reasonable, and *nondiscriminatory*." 47 U.S.C. § 251(c)(3) (emphasis added). In its *Local Competition Order,* the Commission held that "the term 'nondiscriminatory,' as used throughout section 251, applies to the terms and conditions an incumbent LEC imposes on third parties *as well as on itself*" (*id.* ¶ 218 (emphasis added)), and that to satisfy its obligation to provide "nondiscriminatory" access an incumbent LEC must provide new entrants with access that is "at least equal-in-quality to that which the incumbent LEC provides to itself" (*id.* ¶¶ 312-313, 315).

Indeed, ensuring that new entrants would have access to the same cost structure, and hence incentive to enter, as that which incumbents themselves face was *the* central Congressional purpose in adopting Section 251(c)(3). Congress understood that "[a]n incumbent LEC's existing infrastructure enables it to serve new customers at a much lower incremental cost than a facilities-based entrant," and that this "most significant economic impediment[] to efficient entry into the monopolized local market must be removed." *Id.* ¶¶ 10-11. To that end, Section 251(c)(3) requires that an incumbent LEC's "economies be shared with new entrants." *Id.* ¶ 11. The Commission has thus held that the Act requires that network element prices be "based on costs similar to those incurred by the incumbents so that incumbents will be "prevent[ed] . . . from inefficiently raising costs in order to deter entry," and further requires that the costs of shared facilities "be recovered in a manner that efficiently apportions costs among users." *Id.* ¶¶ 743, 755.

Section 251(c)(3)'s nondiscrimination obligation thus prohibits Applicants from imposing costs on new entrants for access to network elements that are any greater than the proportionate costs Applicants themselves must bear when using the network element in question. Indeed, the very concept of electronic gateways and interfaces is to create a "neutral" interface that translates electronic communications between differing incumbent and entrant systems, and developing, implementing and testing these translations will obviously require work and expense by *both* the incumbent LEC *and* the requesting carrier. In this context, Section 251(c)(3) therefore requires that the costs of developing OSS must be spread among all carriers, including Applicants, on a competitively neutral basis – *i.e.*, that the share of OSS costs borne by each carrier does not affect significantly any carrier's ability to compete with other carriers for customers in the marketplace.

xDSL and Advanced Services Deployment (Condition VI)

Applicants' proposed condition relating to access to xDSL-related unbundled elements (Condition VI) is practically meaningless and falls far below what the Act already requires. Applicants have made no commitment at all on a number of important xDSL-related issues, and even as to the few issues the conditions do address, their commitments are wholly inadequate.

Indeed, the most remarkable aspect of Condition VI is how *few* requirements it contains. Undoubtedly recognizing the importance of xDSL offerings to the future of competition in the local market,[66] Applicants have been careful to limit their xDSL commitments as much as possible. Apart from Applicants' promises to deploy xDSL facilities in low income and rural areas (Proposed Conditions ¶ 20), their xDSL commitments extend only to certain OSS access to loop qualification information (¶¶ 21-23) and the rates for loop conditioning (¶ 24).

With such minimal commitments, Applicants have ensured that they retain maximum flexibility to impose anticompetitive conditions on competitive LECs' access to xDSL-related facilities. For example, in Texas, SBC has sought to impose a number of anticompetitive conditions on access to xDSL loops, including the terms and conditions for loop deployment, spectrum management provisions, loop rates, and provisioning intervals.[67] In stark contrast, Applicants make *no* commitments that would prevent such abuses, and the Proposed Conditions' studied silence on those issues permits them to continue to impose such restrictions with impunity. In the absence of additional conditions addressing these other areas of concern, the merger conditions will do nothing to promote competition in xDSL-related services or to hinder Applicants' ability to frustrate a competitive LEC's attempt to obtain unbundled xDSL loops. Indeed, Applicants refuse even to pay lip service to the Commission's advanced services orders:

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[66] As the Commission has found, "all electronic communications are becoming digital." Memorandum Op. and Order and Notice of Proposed Rulemaking, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd. 24012, ¶ 6 (1998) ("*Section 706 Order*"). "Packet-switched transmission of digitized information [such as xDSL services] promises a revolution in information, communications, services, and entertainment." *Id.*

[67] *Investigation into Southwestern Bell Telephone Company's Entry into the Texas InterLATA Telecommunications Market*, Project No. 16251 (Texas PUC); *Petition of Accelerted Connections, d/b/a/ ACI Corp. for Arbitration to Establish an Interconnection Agreement with Southwestern Bell Tel. Co.*, Docket No. 20226 (Texas PUC); *Petition of Dieca Communications, Inc. d/b/a Covad Communications Company for Arbitration of Interconnection Rates, Terms, and Conditions and Related Arrangements with Southwestern Bell Tel. Co.*, Docket No. 20272 (Texas PUC).

although Applicants elsewhere agree to comply with the Commission's orders regarding collocation of advanced services equipment (*see* Proposed Conditions ¶ 3), Applicants *do not* commit to comply with other aspects of the Commission's advanced services orders.

Moreover, the proposed xDSL-related obligations, paltry as they are, would be entirely inadequate even as to the limited areas they address. For example, Applicants' OSS commitments for loop information (¶¶ 21-23) suffer from numerous deficiencies. First, although Applicants commit (¶ 21) to offer electronic access to certain (undefined) loop pre-qualification information, they do not commit to offer electronic access in the Ameritech states, Connecticut, or Nevada until 22 months after the Merger Closing Date (*id.*). Condition VI likewise does not provide any detail about the "phase-in" period, and therefore electronic access may not be available in any of these states until the full 22 months elapse. There is no justification for these extensive "phase-in" periods. Moreover, Applicants make *no* commitment to provide other critically important loop information (such as the presence of repeaters, bridge taps, or load coils) on an electronic basis at all – *ever*. Rather, Condition VI simply states (¶ 23) that such information will be provided, in all of Applicants' states, "whether such access is by electronic or non-electronic means." Thus, Condition VI, by its explicit terms, does not even guarantee competitive LECs the minimum electronic access to essential information that the Act requires.

Second, Applicants' commitment to make available the same loop pre-qualification information "that is available to SBC/Ameritech's retail operations" is discriminatory. This is what SBC has offered in Texas, but in state arbitration proceedings it has been revealed that SBC in fact has *other* databases offering extensive and far more detailed information about loop characteristics to which competitive LECs could be afforded access. These other databases are used primarily by SBC's *engineers*, not by its retail representatives in the deployment of its retail ADSL service offering – and hence the carefully worded proposed condition – although even its retail representatives can access this information. Therefore, the information that Applicants have committed to provide electronically is flatly inconsistent with the Act's requirement of nondiscriminatory access and parity.

Third, the information that Applicants do say they will provide falls well short of what the Act requires. The only information Applicants have specifically committed to offer electronically to competitive LECs is whether a particular loop is less than 12,000 feet, between 12,000 and 17,500, or more than 17,500. *See* Proposed Conditions ¶ 21(a). Again, this is what SBC offers in Texas and, as competitive LECs there have found, by itself it is not useful or relevant information for the purpose of deploying xDSL-based services. Competitive LECs can and should be provided the exact loop length; SBC's three broad categories of loop length are arbitrary and do not correspond to the provisioning of any form of xDSL facilities. But more fundamentally, competitive LECs need electronic access to other loop characteristic information as well, such as the equivalent 26 awg resistance, the presence of repeaters, bridge taps, or load coils, and the servicing technology. Competitive LECs need true nondiscriminatory access to SBC's and Ameritech's databases so that competitive LECs can make their own evaluation of the characteristics of a particular loop.[68]

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[68] Applicants' further commitment (¶ 22) to provide Internet access to loop pre-qualification information "on a mass market basis" is also practically worthless. Although the condition is vague, the only information that can be provided based on the basis of "a zip code of end-users within a wire center" is extremely general information (such as merely whether or not the ILEC has the capability of providing xDSL loops for some subset of the customer base in the office that typically serves the zip code input) that is not useful for actual implementation of xDSL

(continued . . .)

Finally, Applicants' commitment (¶ 24) concerning the rates for loop conditioning are inconsistent with the Act's requirement of cost-based rates. 47 U.S.C. § 252(d). Under the Commission's forward-looking, economic cost methodology, the appropriate rate for loop conditioning should be *zero* – not the hundreds (or thousands) of dollars per loop set forth in Attachment C. Pursuant to that standard, competitive LECs are entitled to rates that reflect the forward-looking economic cost of an efficiently-designed network, not rates that force competitive LECs to pay for the incumbent's embedded investments in antiquated equipment that interferes with the efficient use of those loops. 47 C.F.R. § 51.505. Thus, far from promoting competition in xDSL services, Condition VI is nothing other than an unwarranted windfall for Applicants.[69]

Structural Separation For Advanced Services (Condition VII)

Condition VII would require Applicants to establish one or more affiliates to offer certain so-called "advanced services." This affiliate would be patterned after a similar proposal in the Commission's recent *Section 706 Order*, which in turn was based on Section 272. However, the terms of Condition VII are weaker in significant respects than those considered in that proceeding as well as weaker than Section 272.

(. . . continued)
loops. In all events, there is no justification for the 12-month delay in the availability of such information.

[69] Even if rates for loop conditioning were appropriate, the condition is also deficient because, among other things, it does not require Applicants to impute those rates to their xDSL operations, nor does it provide for any "true-up" to competitive LECs after the interim rates are replaced with permanent rates. The condition also provides that the interim rates apply unless a different rate is available "to all CLECs," which seems to assume an unlawful exception to the "pick-and-choose" rules and Section 252(i) of the Act.

Condition VII proposes to define "advanced services" in a manner far broader than the meaning the Commission gave that term just months ago, bringing even ordinary dial-up Internet access within the scope of that phrase, as well as voice communications that involve packet switching at any point in their transmission path. Further, although Condition VII is completely silent on the issue, Applicants have argued in this proceeding that by utilizing a minimally separated affiliate, they can avoid the obligations that the Act imposes on incumbent LECs, such as the unbundling and resale requirements of Section 251(c). Although this claim is meritless as a matter of law, if Condition VII is adopted Applicants presumably will refuse to comply with Section 251(c) when they use an "advanced services affiliate" to provide local exchange and exchange access service – even when they provide those services in their own region, under their own brand. Applicants could even go so far as to use their advanced services affiliate to construct a "shadow network," building loops and installing other facilities to serve their most profitable customers, while denying competitive LECs the ability to obtain unbundled elements or to resell these services, and failing to upgrade the "incumbent LEC" network used by their other customers.

A. Condition VII's Definition Of "Advanced Services" Does Not Comport With The Commission's Prior Rulings

As a preliminary matter, Condition VII gives "advanced services" a vastly broader meaning than the Commission's *Section 706 NOI Report*[70] gave that term mere months ago. The report defined the statutory term "advanced telecommunications capability" as

[70] Report, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable And Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146 (FCC Feb. 2, 1999) ("*Section 706 NOI Report*").

telecommunications services "having the capability of supporting, in both the provider-to-consumer (downstream) and the consumer-to-provider (upstream) directions, a speed (in technical terms, 'bandwidth') in excess of 200 kilobits per second (kbps) in the last mile." *Id.* ¶ 20. The Commission defined "advanced services" as those services offered via "advanced telecommunications capability."[71] In stark contrast, Condition VII defines (¶ 26) "advanced services" merely as "wireline, telecommunications services . . . that rely on packetized technology and have the capability of supporting transmission[] speeds of a least 56 kilobits per second in at least one direction."

Condition VII's definition would sweep in any form of wireline telecommunications extant today so long as the transmission was, at some point in its transmission path, packetized. Fifty-six kbps is today achievable on an ordinary twisted-pair copper telephone line. The proposed standard therefore would deem dial-up Internet access via POTS lines an "advanced service," as well as voice over IP ("VoIP") or other packet-switched voice services. There is no reasoned basis for this departure from Commission precedent. Condition VII would permit Applicants to use so-called advanced services affiliates to provide a wide array of services that the Commission has expressly found are not "advanced" at all.

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[71] Notice of Inquiry, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable And Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, 13 FCC Rcd. 15280, ¶ 13 n.8 (1998) ("We distinguish between advanced telecommunications capability and services derived from it ('advanced services'), as in the distinction between infrastructure and applications, or between facilities and services offered to end users.").